90-579

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SYLVESTER R. WOODS, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the military judge failed to conduct an appropriate inquiry under R.C.M. 811(c) when he accepted Prosecution Exhibit 1, a stipulation of fact which was confessional in nature.

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The Petitioner, Sylvester R. Woods, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on July 6, 1990.

OPINIONS BELOW

The United States Air Force Court of Military Review issued an unreported decision on April 11, 1989 (Appendix A). The first opinion of the United States Court of Military Appeals is reported at 30 M.J. 214 (C.M.A. 1990) (Appendix B). The decision of the United States Court of Military Appeals on reconsideration is reported at —— M.J. —— (C.M.A. 1990) (Appendix C).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on July 6, 1990. The jurisdiction of this court is invoked under 28 U.S.C. § 1259(3) (Supp. III 1985) and 10 U.S.C. § 867(h) (Supp. III 1985).

REGULATORY PROVISIONS INVOLVED

Rule for Courts-Martial 811, Manual for Courts-Martial, United States, 1984 provides in relevant part:

> Rule 811. Stipulations
>
> (a) *In general.* The parties may make an oral or written stipulation to any fact, the contents of a document, or the expected testimony of a witness.
>
> (b) *Authority to reject.* The military judge may, in the interest of justice, decline to accept a stipulation.
>
> (c) *Requirement.* Before accepting a stipulation in evidence, the military judge must be satisfied that the parties consent to its admission.
>
> *Discussion*
>
> Ordinarily, before accepting any stipulation the military judge should inquire to ensure that the accused understands the right not to stipulate, understands the stipulation, and consents to it.
>
> If the stipulation practically amounts to a confession to an offense to which a not guilty plea is outstanding, it may not be accepted unless the military judge ascertains: (A) from the accused that the accused understands the right not to stipulate and that the stipulation will not be accepted without the accused's consent; that the accused understands the contents and effect of the stipulation; that a factual basis exists for the stipulation; and that the accused, after consulting with counsel, consents to the stipulation; and (B) from the accused and counsel for each party whether there are any agreements between the parties in connection with the stipulation, and, if so, what the terms of such agreements are. . . .

STATEMENT OF THE CASE

The petitioner, an Air Force enlisted member, was tried by general court-martial at Mather Air Force Base, California on October 20, 1988. Contrary to his pleas, he was convicted of wrongfully using cocaine on or about June

30, 1988. The petitioner was sentenced to a bad conduct discharge, confinement for nine months, forfeiture of $100.00 pay per month for nine months and reduction to E-1, the lowest enlisted grade.

The Government's case rested entirely upon a positive urinalysis result. The prosecution's evidence consisted of a stipulation of fact (Prosecution Exhibit 1), the Air Force Drug Testing Laboratory's report (Prosecution Exhibit 2), and the testimony of Dr. Norman A. Wade, an expert in the field of forensic toxicology (R. 9-17).

Prosecution Exhibit 1 stated that the petitioner had submitted a urine sample on June 30, 1988 as part of a valid consensual search, that the same urine sample was properly sent to the Air Force Drug Testing Laboratory, and that the sample tested positive for presence of cocaine. The military judge conducted the following inquiry with the petitioner before accepting the stipulation into evidence (R. 8-9):

> MJ: Sergeant Woods, have you read the stipulation, Prosecution Exhibit 1 for Identification?
> ACC: Yes, sir.
> MJ: Do you feel you fully understand it?
> ACC: Yes, sir.
> MJ: You are not required to consent to this stipulation. If you do not consent to it, the facts set out in this stipulation may be presented only by having other legal and competent evidence presented. Do you understand that?
> ACC: Yes, sir.
> MJ: Knowing and understanding that you are not required to agree to this stipulation, do you agree to it?
> ACC: Yes, sir.

Thereupon, the military judge accepted the stipulation and admitted it into evidence (R. 9)

The defense presented three witnesses on the merits. Dr. Chamarado Rao, an Air Force psychiatrist, testified about the effects of alcohol on the human body (R. 21).

She also testified that she had diagnosed the petitioner as being alcohol dependent (R. 23). Miss Rommelle Johnson, who was with the petitioner on the night before the urinalysis test, testified that she had not observed any abuse of cocaine (R. 37-54). Lastly, petitioner testified about his whereabouts and actions between June 26, 1988 and June 30, 1988 (R. 55-74). He further testified that he had never knowingly used cocaine (R. 65), but that he suffered from alcoholic blackouts of memory (R. 60-62).

The Air Force Court of Military Review affirmed the petitioner's case in a short *per curiam* decision. *United States v. Woods*, A.C.M. 27428 (A.F.C.M.R. Apr. 11, 1989). The United States Court of Military Appeals granted review on whether the military judge erred in failing to conduct an appropriate inquiry under Rule for Courts-Martial 811(c). The court, in a summary disposition of this case, held that the stipulation of fact did not conclusively prove that the petitioner had wrongfully used cocaine, and therefore, the Court of Military Review had correctly concluded that the stipulation was not confessional in nature. *United States v. Woods*, 30 M.J. at 214.

REASONS FOR GRANTING THE WRIT

Because the stipulation established directly or by clearly reasonable inference every element of the charged offense, it was confessional in nature. The Manual for Courts-Martial defines a confessional stipulation as a stipulation which establishes directly or by reasonable inference every element of the offense and when the defense does not present any evidence to contest any potential remaining issues on the merits. *See* R.C.M. 811(c), Discussion and *U.S. v. Bertelson*, 3 M.J. 314 (CMA 1977).

The stipulation in the instant case established the complete validity of the urinalysis conducted upon the accused. In *U.S. v. Harper*, 22 M.J. 157 (CMA 1986), the Court of Military Appeals held that a rational fact finder could rely upon evidence of a positive urinalysis result, supported by interpretive expert testimony, to infer that

an accused used a controlled substance and that the use was wrongful. In the instant case, the stipulation established that a properly conducted urinalysis test of the petioner's urine revealed the presence of cocaine metabolite, benzoylecgonine, and that ingestion of cocaine is the only reason that benzoylecognine could be found in a person's urine. (Prosecution Exhibit 1, paragraph 5). Therefore, based on this stipulation alone a fact finder could have found the petitioner guilty of the charged offense under *Harper*.

Additionally the defense did not present any credible defense to the charge on the merits, which would remove the stipulation's characterization as a confessional stipulation. *U.S. v. Hagy*, 12 M.J. 739 (AFCMR 1981).

The defense did offer some evidence which implied that the petitioner might have unknowingly ingested cocaine; however, the stipulation remains confessional because the defense's evidence was uncertain and self-contradictory. The accused testified that he had not knowingly used cocaine during the charged period, but he also testified that he had suffered from alcoholic blackouts for large portions of the evening June 29-30, 1988 (R. 60-62).

The defense's psychiatric expert witness testified about alcohol blackouts and on the possibility that excessive alcohol consumption could lead to a state of intoxication where a person enters a "semi-stuporous state" and would not realize what he is doing (R. 35-36). But another witness for the defense testified the petitioner had not consumed very much alcohol, he did not seem overly intoxicated, nor did he show any symptoms of cocaine use during his period of blackout on June 29-30, 1988. (R. 42-45). Thus, the petitioner's unknowing ingestion defense by reason of excessive alcohol intoxication was plainly incredible. No one ever established that the petitioner entered the "semi-stuporous state" which would have made him unaware of what he was doing. The defense's own evidence contradicted the existence of a semi-stuporous state by establishing that during the period in question the petitioner participated in conversation, he

did not seem overly intoxicated, and he had not consumed very much alcohol. Therefore, the stipulation remained confessional after the defense's case-in-chief.

The military judge failed to make an adequate inquiry concerning the stipulation of fact. Because the stipulation was confessional in nature, the military judge should have inquired beyond the standard inquiry contained in Department of Army Pamphlet 27-9, *Military Judge's Benchbook*, para. 2-18 (Change I, 15 Feb. 85). At a minimum the military judge should have obtained on the record an acknowledgement from the petitioner that the stipulation "practically amounts to a confession" (*U.S. v. Bertelson*, 3 M.J. at 315, n. 2), that the effect of the stipulation is to alleviate the Government's burden of proof beyond a reasonable doubt as to every element of the offense involved, and that the petitioner specifically consents thereto. *U.S. v. Honeycutt*, 29 M.J. 416 (C.M.A. 1990). The military judge's failure to do so constitutes error.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Major, Office of the
Judge Advocate General
United States Air Force
Counsel for Petitioner

October 1990

APPENDICES

APPENDIX A

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Staff Sergeant SYLVESTER R. WOODS, JR., FR 466-94-5957
UNITED STATES AIR FORCE

ACM 27428

[11 APR 1989]

Sentence adjudged 20 October 1988 by GCM convened at Mather Air Force Base, California. Military Judge: Michael B. McShane (sitting alone).

Approved Sentence: Bad conduct discharge, confinement for nine (9) months, forfeiture of one hundred dollars ($100.00) pay per month for nine (9) months and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Bernard E. Doyle, Jr.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagoni and Major Kathryn I. Taylor.

Before

LEWIS, BLOMMERS and KASTL
Appellate Military Judges

DECISION

PER CURIAM:

Contrary to his pleas, the appellant was found guilty at a bench trial of wrongful use of cocaine based upon the presence of its metabolite benzoylecgonine in his urine. The sentence, as adjudged and approved, is a bad conduct discharge, confinement for nine months, forfeiture of $100.00 per month for nine months, and reduction to airman basic (E-1). Two errors are raised before us: (1) that the military judge failed to conduct an appropriate inquiry under R.C.M. 811(c) (often referred to as the *Bertelson* inquiry);* and (2) that the sentence is excessive.

The parties entered into a stipulation of fact regarding the taking of the sample, its handling during the testing process, and the test results. In essence, it was conceded that the appellant had ingested cocaine. In his opening statement after the Government rested its case, defense counsel stated: "Our only challenge goes to the second element of the offense, that element being wrongfulness, in that we will show that Sergeant Woods has no knowledge of ever consuming cocaine." The defense called three witnesses, including the appellant, in an effort to so convince the court. We find *United States v. Kepple*, 27 M.J. 773 (A.F.C.M.R. 1988), and *United States v. Hagy*, 12 M.J. 739 (A.F.C.M.R. 1981), *pet. denied*, 13 M.J. 204 (C.M.A. 1981) are dispositive of this issue. The first assignment of error is without merit.

With regard to the appropriateness of the sentence, we note that the appellant has over 17 years in service, during the vast majority of which he performed honorably. Among other decorations, he has been awarded the Air Force Commendation Medal on four occasions. His Performance Report file indicates excellent to outstanding performance throughout most of his career. Although

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* *United States v. Bertelson*, 3 M.J. 14 (C.M.A. 1977).

separated, he has a wife and two children to whom he is providing financial support. Recently, however, he has experienced financial and drinking problems which led to disciplinary actions against him. He has twice received nonjudicial punishment (Article 15, UCMJ); once in May 1988 for uttering checks when he did not have sufficient funds in his account to cover them, and again in July for being drunk on duty. He has been medically diagnosed as "alcohol-dependent." The Government's expert witness, a forensic toxiocologist, testified that the high level of concentration of the cocaine metabolite in the tested specimen (37,690 nanograms per milliliter) was indicative of the ingestion of a very large dose of cocaine. Based upon these factors, and our review of the entire record, recognizing our independent responsibility to affirm a sentence or part or amount thereof we find appropriate, we have determined that the approved sentence is proper. Article 66(c), UCMJ; *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Espinoza*, 27 M.J. 551 (C.G.C.M.R. 1988).

The approved findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

[SEAL]

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

APPENDIX B

Wednesday, March 28, 1990

90-121

APPEALS—SUMMARY DISPOSITIONS

* * * *

No. 62533/AF. U.S. v. Sylvester R. Woods, Jr. CMR 27428. On further consideration of the granted issue (28 MJ 442) in light of *United States v. Honeycutt*, 29 MJ 416 (CMA 1990), we hold that the stipulation of fact in this case did not conclusively prove that appellant wrongfully used cocaine. *See United States v. Mance*, 26 MJ 244 (CMA), *cert. denied*, —— U.S. ——, 109 S.Ct. 367, 102 L.Ed.2d 356 (1988). Therefore, the Court of Military Review correctly concluded that the stipulation was not confessional in nature. *Cf. United States v. Bertelson*, 3 MJ 314 (CMA 1977). Accordingly, it is ordered that the decision of the United States Air Force Court of Military Review is affirmed.

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 62533/AF
CMR Dkt. No. 27428

UNITED STATES,
Appellee

v.

SYLVESTER R. WOODS, JR. (466-94-5957),
Appellant

ORDER

Upon consideration of appellant's petition for reconsideration of this Court's decision in the above-entitled case, 30 MJ 214 (March 28, 1990), we conclude that the ruling, as rendered, should stand. Accordingly, it is, by the Court, this 6th day of July 1990

ORDERED:

That the petition for reconsideration is denied.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (DOYLE)
Appellate Government Counsel (NIX)

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